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IN THE

Supreme Court of the United States

October Term, 1972
No. .....

ROBERT E. POFF, doing business as 1st KING,

Petitioner,

vs.

THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA and THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal

BRIEF OF RESPONDENT IN OPPOSITION

Opinions Below

The decision of the Department of Alcoholic Beverage Control that is the subject of this litigation suspending petitioner's license for thirty days is reproduced as Appendix A to the petition. The opinion of the Alcoholic Beverage Control Appeals Board affirming the suspension is set forth as Appendix B to the petition.

The order of the Court of Appeal, Second Appellate District, is reproduced as Appendix C to the petition, and the order of the Supreme Court of the State of California denying a hearing without opinion is attached as Appendix D to the petition.

Questions Presented

1. Is the Alcoholic Beverage Control Act of the State of California unconstitutional insofar as it permits the Department of Alcoholic Beverage Control to revoke a license upon a determination that live entertainment is obscene or is contrary to public welfare or morals after an administrative proceeding without requiring the Department to seek a judicial determination on the subject.

2. Is the power of the Department of Alcoholic Beverage Control to suspend or revoke a license for conduct contrary to public welfare or morals unconstitutionally broad when applied to speech and expression protected by the First Amendment.

3. Was the Department's finding that the events described in the decision were contrary to public welfare or morals supported by evidence sufficient to satisfy the requirements of the First and Fifth Amendments.

Statement of the Case

Petitioner's petition for writ of certiorari accurately sets forth the progress of this case before the Department of Alcoholic Beverage Control, the Alcoholic Beverage Control Appeals Board and the courts of the State of California. Further, at page 7 of the petition, petitioner states that "All of the findings of fact contained in the decision are supported by the evidence or by stipulation, with the singular exception of the finding that the various described acts were contrary to public welfare or morals." Additionally, the hearing officer's proposed decision (Appendix A to the petition) accurately sets forth the factual issues and thus same will not be repeated herein.

ARGUMENT

I

Petitioner Was Not Charged With Obscene Conduct and Thus There Is No Requirement That the Department Seek a Judicial Determination on the Subject

Petitioner contends that the Department is required to seek a judicial determination as to whether the conduct involved was obscene pursuant to *Blount v. Rizzi*, 400 U.S. 410 (1971). However, petitioner fails to recognize that the charge involved in the accusation was that the conduct was contrary to public welfare and morals; not that the conduct was obscene. Accordingly, no separate judicial determination is required on the issue of obscenity. It is submitted that the Department was not attempting to control petitioner's conduct because it was obscene, but because of the inimical results that might flow from such conduct.

Additionally, this case differs from *Blount, supra*, in that under the procedures of 39 U.S.C. section 4007 only probable cause is needed to obtain a restraining order. Under the Alcoholic Beverage Control Act a full hearing on the issues is afforded petitioner. However, since obscenity was never an issue in the instant case, *Blount* clearly does not apply.

Petitioner also contends that its conduct was a form of expression protected by the First Amendment since the female employees of petitioner were performing a dance for the purpose of entertainment at the time the objectable conduct occurred. However, the inquiry does not stop at that point.

> ". . . We deal in this case not with free speech alone, but with expression mixed with particular conduct. . . ." *Cox v. Louisiana*, 379 U.S. 559, 562, 564 (1965).

Thus if we accept petitioner's contention that the objectionable conduct was a form of communication, such conduct cannot continue unfettered. In the case of *United States v. O'Brien,* 391 U.S. 367 (1968) the court stated as follows:

> "However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, *a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.* To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. . . ." *United States v. O'Brien, supra* at 376-77. (Emphasis added.)

Of course the power of the government to enact legislation and to delegate to administrative agencies the power to enact regulations pursuant thereto cannot be

viewed as unlimited. It would seem the government would have little success in attempting to prohibit sales of the book *Fanny Hill* on the theory that, although not obscene, it was contrary to public morality. As noted by the California Supreme Court in *In re Giannini,* 69 Cal. 2d 563, 569, n. 2, 72 Cal. Rptr. 655 (1968), the problem is one of striking a balance between freedom of expression and the interest of the state in protecting public morality. The constructing of one rule to cover all situations will undoubtedly be unwise if even possible. Nevertheless for the present case and for alcoholic beverage cases in general a standard can be established. The dissenting opinion of District Judge William P. Gray briefly, but articulately, expresses this standard by referring to the potentially harmful effects of prohibitive conduct *in combination with the use of alcoholic beverages.* When the conduct of nude dancing combined with the use of alcoholic beverages creates a threat to public welfare and morality the legislature is reasonable in exerting its police power to enact legislation designed to eliminate or curb these harmful effects. Whether a particular statute or regulation is a most wise or most effective method in accomplishing this purpose is not a question for the court. *Williamson v. Lee Optical Company,* 348 U.S. 483 (1955); *Berman v. Parker,* 348 U.S. 26 (1954).

The United States Supreme Court has made it clear that the First Amendment right of freedom of expression is not absolute and is subject to government regulations under conditions established by such decisions such as *United States v. O'Brien,* 391 U.S. 367.

> "At the outset we reject the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are 'absolutes'

> . . . . Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. . . . On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. . . ." *Konigsberg v. State Bar,* 366 U.S. 36, 49-51 (1961).

The power of the Department is directed to the regulation and control of the liquor industry. The exercise of this governmental interest justifies incidental limitations on freedom of expression.

Petitioner further claims that the Department's determination that its conduct was *per se* contrary to public welfare or morals has in effect deprived petitioner of a fact hearing on the critical issue. However, petitioner fails to recognize that the California courts have not required the Department to introduce evidence pertaining to standards of morality generally accepted by the community when the conduct involved can be almost immediately repudiated as being contrary to said standards.

> "There may be cases in which the conduct at issue is so extreme that the Department could conclude that it is per se contrary to *public morals*. By this we mean that it is so vile and its impact upon society is so corruptive, that it can be almost immediately repudiated as being contrary to the standards of morality generally accepted by the community after a proper balance is struck between personal freedom and social restraint. . . ." *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control*, 2 Cal. 3d 85, 101, 84 Cal. Rptr. 113 (1970).

Respondent recognizes that such conduct may very well not be subject to criminal prosecution for violation of the obscenity laws. However, the Department of Alcoholic Beverage Control is not confined to consideration of violation of criminal statutes or departmental directives as grounds for suspension or revocation of a liquor license. It may act on situations contrary to public morals regardless of legislative expressions of the policy on the subject or prior departmental announcement. *Boreta Enterprises Inc. v. Department of Alcoholic Beverage Control, supra* at 99 n. 22. The principle that the state has an interest in regulating conduct manifesting sexual desires and urges which offend public morals is well established.

> ". . . Conduct which may fall short of aggressive and uninhibited participation in fulfilling the sexual urges of homosexuals, reported in some instances [citation], may nevertheless offend good morals and decency by displays in public which do no more than manifest such urges. This is not

> to say that homosexuals might properly be held to a higher degree of moral conduct than are heterosexuals. But any public display which manifests sexual desires, whether they be heterosexual or homosexual in nature may, and historically have been, suppressed and regulated in a moral society." *Vallerga v. Dept. of Alcoholic Bev. Control,* 53 Cal. 2d 313, 319, 1 Cal. Rptr. 494 (1959).

Respondent wishes to emphasize that the acts found in the decision of the Department to have occurred and which were sustained by respondent Alcoholic Beverage Control Appeals Board extended beyond the limited realm of nude dancing and included misconduct of the licensee's employees. Section 23090.3 of the Business and Professions Code provides in relevant part as follows:

> "The findings and conclusions of the department on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the department . . ."

Respondent submits that there can be no doubt that the conduct which was found to have occurred can indeed be immediately repudiated as contrary to public morality. *Cf. Alder v. Dept. of Alcoholic Bev. Control,* 174 Cal. App. 2d 256, 344 P. 2d 336 (1959).

II

The Power of the Department to Suspend or Revoke a License for Conduct Contrary to Public Morals as Applied to Conduct Which Is a Form of Expression Is Not Unduly Vague Since the Power Is Not Susceptible of Sweeping and Improper Implication

It is well established that the power of the Department to suspend or revoke a license for conduct contary to public morals is self executing and may be based on those grounds alone if the licensee is otherwise accorded due process of law. *Vallerga v. Dept. of Alcoholic Bev. Control,* 53 Cal. 2d 313, 319, 1 Cal. Rptr. 494. In *Boreta Enterprises Inc. v. Department of Alcoholic Beverage Control,* 2 Cal. 3d 85, 84 Cal. Rptr. 113, the California Supreme Court stated:

> "It is not disputed that while the Department may properly look to and consider a licensee's violation of the Alcoholic Beverage Control Act, the Penal Code, other state and federal statutes, or Department rules as constituting activities contrary to public welfare or morals, it may also act on situations contrary to the public welfare or morals in the sale or serving of alcoholic beverages regardless of legislative expressions of policy on the subject or *prior* departmental announcements." *Boreta, supra* at 99, n. 22 (emphasis added).

The conduct in the present case is similar in some respects to that in the *Vallerga* case. *Vallerga* involved public display of sexual desires by patrons on licensed premises. In this case each of the subcounts involved expressions of a vulgar and distasteful nature sug-

gesting sexual desires on the part of the patrons. The power of the Department to impose disciplinary action for conduct of patrons which is contrary to public morality is well established. *Morell v. Dept. of Alcoholic Bev. Control,* 204 Cal. App. 2d 504, 22 Cal. Rptr. 405 (1962); *Presto v. Alcoholic Bev. Etc. Appeals Bd.,* 179 Cal. App. 2d 262, 3 Cal. Rptr. 742 (1960); *Givens v. Dept. of Alcoholic Bev. Control,* 176 Cal. App. 2d 529, 1 Cal. Rptr. 446 (1959).

Nevertheless petitioner urges that the conduct involved in the present case is protected by the First Amendment and as applied to conduct protected by the First Amendment suffers from vagueness and overbreadth.

Discipline in the present case is found in part on the elements of vulgar and distasteful comments by patrons. Nevertheless, those comments are a form of expression *in absence of proof* of obscenity and are presumptively protected by the First Amendment.[1] Respondent will deal in subsequent portions of this brief with the question of whether the Department may regulate the contrary to public morals conduct which is presumptively protected by the First Amendment. Whatever the outcome of that issue, the power of the Department to regulate conduct as contrary to public welfare or morals does not suffer from vagueness or overbreadth. In *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963) the court stated:

> ". . . The objectionable quality of vagueness and overbreadth does not depend upon ab-

[1]Respondent also suggests that the comments in the present case may fall into a class of extreme or unquestionable situations which obviate the need of proof of community standards. *Cf. In re Giannini,* 69 Cal. 2d 563, 575-76, n. 8, 72 Cal. Rptr. 655.

sence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . ." *N.A.A.C.P. v. Button, supra* at 432-33.

The decision of the California Supreme Court in *Boreta Enterprises Inc. v. Department of Alcoholic Beverage Control,* 2 Cal. 3d 85, 84 Cal. Rptr. 113, assures that the power of the Department pertaining to the regulation of conduct contrary to public morality will not be applied in a sweeping and improper manner by requiring that the question of public morality be proved as any other fact at a trial, unless the conduct involved is *per se* contrary to public morality. With this requirement of proof *per se* public morality, the application of the power of the Department can be no broader than the power itself.

III

The Power of the Department to Regulate Conduct Contrary to the Public Morality Is Not Limited to Obscenity

Petitioner's contention that the power of the Department to regulate the public morals is limited to obscenity rests heavily on the decision in the case of *LaRue v. State of California,* 326 F. Supp. 348 (C.D. Cal. 1971), Jur. noted, *California v. LaRue,* 92 S.Ct. 559 (1971).

In the *LaRue* case, the three judge panel held that the regulation promulgated by the Department pertaining to the subject of entertainer's conduct and visual displays unconstitutionally interfered with the

right of freedom of expression under the First Amendment. In the present case, the accusation was based on violations of laws pertaining to the public welfare and morals, and not upon violations of these regulations. Furthermore the conduct involved in the present case is far more severe in substance than the conduct proscribed by the regulation in the *LaRue* case. Nevertheless, the basis for the court's holding was that the power of government to regulate the kind of conduct involved is limited to instances of obscenity. At page 356, in the *LaRue* case the court stated:

> ". . . The First Amendment, however, directs that concepts of public welfare and morality may not prohibit a dance no matter how immoral it may appear to be, unless it violates an obscenity statute that meets the test of *Roth*. . . ."

Since in the present case it is not proven in accordance with the guidelines established by the California Supreme Court in *In re Giannini, supra,* 69 Cal. 2d 563, 72 Cal. Rptr. 655, that the conduct involved was obscene under the Roth test the decision in the present case must be remanded unless a decision in *LaRue* is erroneous. The decision is erroneous. The assumption of the court in *LaRue* that the power of government in protecting the public morality is limited to matters which are obscene as they relate to conduct which constitutes a form of expression is based on the court's misinterpretation of the decision in *Stanley v. Georgia,* 394 U.S. 557 (1969). In the *LaRue* decision, the court stated at page 356:

> "Theatrical entertainment may not be prohibited without a constitutional obscenity test

> because the state deems it necessary to protect the welfare and morals. That decision was made by the Supreme Court in Stanley v. Georgia, . . ."

Putting aside for the moment the main issue of whether the power of the state in protecting the public morality is limited to obscene matters, a recent decision of the United States Supreme Court makes it clear that the court in *LaRue* improperly relied on *Stanley v. Georgia, supra,* in deciding this issue. The decision in *United States v. Reidel,* 402 U.S. 351, 355, 356 (1971) rendered subsequent to the *LaRue* decision, stated as follows:

> "The District Court ignored both Roth and the express limitations on the reach of the Stanley decision. Relying on the statement in Stanley that 'the Constitution protects the right to receive information . . . regardless of their social worth,' 394 U.S. at 564, the trial judge reasoned that 'if a person has the right to receive and possess this material, then someone must have the right to deliver it to him'. He concluded that section 1461 could not be validly applied 'where obscene material is not directed at children, or it is not directed at an unwilling public, where the material such as in the instant case is solicited by adults. . . .'
>
> "The District Court gave Stanley too wide a sweep. To extrapolate from Stanley's right to have and peruse obscene material in the privacy of his own home a First Amendment right in Reidel to sell it to him would effectively scuttle Roth, the precise result that the Stanley opinion abjured.

Whatever the scope of the 'right to receive' referred to in Stanley, it is not so broad as to immunize the dealings in obscenity in which Reidel engaged here—dealings that Roth held unprotected by the First Amendment.

"The right Stanley asserted was 'the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home.' 394 U.S. at 565. The Court's response was that 'a State has no business telling a man, sitting alone in his own house what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.' Ibid. The focus of this language was on freedom of mind and thought and on the privacy of one's home. It does not require that we fashion or recognize a constitutional right in people like Reidel to distribute or sell obscene materials. The personal constitutional rights of those like Stanley to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitutionally protected. Their rights to have and view that material in private are independently saved by the Constitution."

Whatever the outcome of the issue raised in the *LaRue* case, the reasoning of the United States District Court in its decision was based on the false premise that the *Stanley* case applies to matters of *public* concern.

The present case is not concerned with the right of privacy, but is concerned with the protection of *public*

morality. The enactment of laws for the protection of the public morality is one of the traditional powers of government which falls within the police power of the state. *Berman v. Parker,* 348 U.S. 26, 32 (1954); *Vallerga v. Dept of Alcoholic Bev. Control,* 53 Cal. 2d 313, 1 Cal. Rptr. 494. The question is then to what extent may this traditional power of government to enact legislation for the protection of the public morality intrude upon a form of expression which potentially is protected by the First Amendment.[2]

IV

The Regulation of the Nonspeech Elements in Nude Dancing for the Protection of the Public Morality Justifies Incidental Limitations on First Amendment Freedoms

Even though the conduct in the present case, nude suggestive dancing by a performer and vulgar and disgusting comments by patrons, is a form of expression, as previously stated, the inquiry does not stop at this

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[2]The validity of this approach to the question was expressly confirmed by the California Supreme Court in a footnote to the decision in *In re Giannini,* 69 Cal. 2d 563, 569, 72 Cal. Rptr. 655, where the court stated:

"Indeed, the concepts of 'potential' and *prima facie* First Amendment protection are becoming increasingly important in areas other than obscenity law. The restricted and literal approach to the definition of speech protected by the First Amendment is gradually being replaced by an emphasis on the interest in communication, whether or not promoted by conduct that is precisely speech. The protection of this interest depends upon a balancing process: the weighing of the interest of the state in suppressing or regulating the questioned conduct as against the opposing interest in the interchange of ideas. [Citations.] California's obscenity law here at issue represents merely a particular, albeit well-

(This footnote is continued on next page)

point as is so often assumed by licensees. As previously stated, in the case of *United States v. O'Brien*, 391 U.S. 367, the court stated as follows:

> ". . . However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, *a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.* To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. . . ." (Emphasis added.) *Supra* at 376-77.

The court in *LaRue* failed to come to grips with this issue because it assumed that the interest and power of

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established, example of this balancing if interests to determine whether First Amendment guarantees apply to a particular example of communication or whether sufficiently important state interests dictate a contrary result."

the government is limited to the prohibition of obscenity. As stated in the opinion:

> ". . . The resulting restriction on First Amendment freedoms is considerably greater than is essential to the furtherance of any legitimate state interest since the Department could, as has been done by the California Legislature, *limit its prohibition to obscene entertainment.*" (Emphasis added.) *LaRue v. State of California, supra,* 355.

As has been the case with this and all other similar cases where the basis of the disciplinary action is the permitting of conduct contrary to public morals in the context of nude entertainment, if it were necessary to show that the entertainment was obscene, all the Department's cases would have to be reversed. The illogic of the Court's reasoning is pointed out by its own statement at page 355 where it says:

> "Of course, sexual conduct between a dancer and a customer could hardly be termed a theatrical performance which is protected by the First Amendment. . . ."

Is the court in *LaRue* saying that if the sexual conduct on stage was only between performers and not with a customer that it could not be prohibited? Would then the court condone sexual intercourse on stage when it occurs during a theatrical performance? Would the court permit draft card burning, the conduct prohibited in the *O'Brien* case, if it occurred in the context of a theatrical performance? The implicit assumption of the court in its statement regarding sexual conduct between a dancer and a customer is that such conduct would *obviously be contrary to public morality.* The weakness of the court's analysis that the interest of the

government is limited to obscenity in the field of public morality is exposed by its attempt to make an exception in what appears to be an extreme case.

The analysis of the court in the *LaRue* case is further weakened by its reliance upon the decision in *Redrup v. New York*, 386 U.S. 767 (1967), at pages 13 and 15 of the decision. On page 355 of the *LaRue* decision the court states:

> ". . . In light of the pre-trial stipulation, it is uncontested that none of the legitimate state interests summarized in Redrup v. New York [citation], in the field of obscenity are involved in the present case. Minors are not allowed to view the entertainment. There is no 'pandering' and the entertainment is presented in such a way that it is not forced upon unwilling individuals."

This approach was also rejected by the court in *United States v. Reidel*, 402 U.S., 351, 357 where the court stated as follows:

> "It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age. The concepts involved are said to be so elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the courts that basic reassessment is not only wise but essential. This may prove to be the desirable and eventual legislative course. . . ."

The United States Supreme Court has made it clear that the First Amendment right of freedom of expression is not absolute and is subject to government regulations under conditions established in such decisions as *United States v. O'Brien, supra.*

> "At the outset we reject the view that freedom of speech and association . . . as projected by the First and Fourteenth Amendments, are 'absolutes' . . . . Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. . . . On the other hand, general *regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise,* have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating *valid governmental interests;* a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. . . ." *Konigsberg v. State Bar,* 366 U.S. 36, 49-51 (emphasis added).

The power of the Department is directed to the regulation and control of the liquor industry. The exercise of this valid governmental interest justifies incidental limitations of freedom of expression.

The disgusting comments of patrons manifesting sexual desires in response to the dancing can be immediately repudiated as contrary to the public morality

of the State of California. The interest of the state in regulating conduct manifesting sexual desires and urges which offend public morals is well established. Since the conduct in the present case is *per se* contrary to public morals, it is of no consequence that petitioner offered testimony on his behalf to the contrary. ***Boreta Enterprises Inc. v. Department of Alcoholic Beverage Control,*** 2 Cal. 3d 85, 94, 84 Cal. Rptr. 113.

All of the facts charged against petitioner were admitted by stipulation or as petitioner admits were supported by the evidence. Accordingly, respondent submits that the decision of the Department was supported by substantial evidence and that the acts complained of were *per se* contrary to public welfare and morals.

Conclusion.

For the foregoing reasons and authority, respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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